No. 9905

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RAYMOND H. JEHL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

OPENING BRIEF FOR APPELLANT.

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JURISDICTION.

The trial Court had jurisdiction under an indictment charging violations of the following sections: 18 U. S. C. A., Sec. 88; 26 U. S. C. A. 2810 (a); 26 U. S. C. A. 2812; 26 U. S. C. A. 2814; 26 U. S. C. A. 2833 (a); 26 U. S. C. A. 2834; 26 U. S. C. A. 3321; 26 U. S. C. A. 3320.

This Court has jurisdiction under Section 128 (a) of the Judicial Code, as amended by Act of February 15, 1925. (28 U. S. C. A., Sec. 225.)

STATEMENT OF THE CASE.

Raymond H. Jehl, the appellant, was indicted by the Grand Jury for the Northern District of California, Southern Division, on the 6th day of May, 1941.

The indictment charged appellant in nine (9) counts with various violations of the Internal Revenue Code with respect to the illicit operation of a still and a conspiracy to operate an illicit still.

The indictment charges that the substantive offenses were committed on the 28th day of August, 1940, on a ranch near Watsonville, Santa Cruz County, California.

The indictment further charges that the conspiracy was to violate the various substantive offenses charged and that the conspiracy was entered into at or about the time alleged in the substantive counts.

The various counts in the indictment allege:

The First Count, the defendants knowingly had in their possession and custody and under their control for the distillation of alcohol, a still and distilling apparatus set up without having registered the same in the manner prescribed by Section 2810 (a) of the Internal Revenue Code.

The Second Count, defendants were engaged in the business of a distiller of alcohol, and then and there wilfully failed to give the notice prescribed by Section 2812 of the Internal Revenue Code.

The Third Count, defendants having then and there commenced the business of distillers of alcohol, wil-

fully failed to give the bond prescribed by Section 2814 (a) (1) of the Internal Revenue Code.

The Fourth Count, that at the time and place described in the first count of this indictment said defendants wilfully engaged in and carried on the business of a distiller of alcohol, with intent to defraud the United States of the tax on the spirits distilled by them.

The Fifth Count, in a building and on premises at said place, said defendants knowingly made and fermented mash, wort and wash, fit for distillation and for the production of alcohol, other than in a distillery duly authorized according to law.

The Sixth Count, said defendants, not then nor there being authorized distillers, knowingly separated by distillation the alcoholic spirits from fermented mash, wort and wash.

The Seventh Count, said defendants did then and there unlawfully, wilfully and knowingly deposit and conceal certain goods and commodities, to-wit, approximately 10 gallons of alcohol, and 100 gallons of whiskey, upon which said goods and commodities there were then and there imposed certain taxes under the Internal Revenue Code.

The Eighth Count, said defendants then and there knowingly and wilfully did have in their possession with intent to sell the same in fraud of the Internal Revenue laws of the United States the said goods and commodities described in the Seventh Count of this indictment upon which there were then and

there due, imposed and unpaid certain taxes to the United States of America.

The Ninth Count, that said defendants, at a time and place to said Grand Jurors unknown, did knowingly, wilfully, unlawfully, corruptly and feloniously conspire, combine, confederate, arrange and agree together, and with divers other persons whose names are to the Grand Jurors unknown, to commit offenses against the United States of America, and the laws thereof, the offenses being to knowingly, wilfully, unlawfully, and feloniously violate the Internal Revenue laws of the United States

(1) By possessing and controlling for the distillation of alcohol a still and distilling apparatus set up, without having registered the same in the manner prescribed by law;

(2) by engaging in the business of distillers of alcohol without having given the notice prescribed by law;

(3) by having commenced the business of distillers of alcohol, having wilfully failed to give the bond prescribed by law;

(4) by engaging in and carrying on the business of distillers of alcohol with intent to defraud the United States of the taxes on the spirits distilled by them;

(5) by knowingly making and fermenting mash, wort and wash fit for distillation and for the production of alcohol in a building and on premises other than in a distillery duly authorized according to law;

(6) by separating by distillation, alcoholic spirits from fermented mash, wort and wash without being registered distillers;

(7) by removing, concealing and depositing tax unpaid distilled spirits with intent to defraud the United States of the tax imposed thereon;

(8) by possessing, buying, selling, transferring and transporting distilled spirits in immediate containers not having thereto affixed the stamps prescribed by law denoting the quantity of spirits therein and evidencing payment of all Internal Revenue taxes imposed thereon;

(9) by removing to and depositing in premises other than an Internal Revenue Bonded Warehouse tax unpaid distilled spirits;

(10) by having in their possession and custody tax unpaid distilled spirits for the purpose of selling the same in fraud of the Internal Revenue laws and with design to avoid payment of the tax imposed thereon;

(11) and by carrying on the business of wholesale liquor dealers without having paid the special tax therefor as required by law.

And the said Grand Jurors, upon their oaths aforesaid, do further charge and present that in pursuance of, and in furtherance of, in execution of, and for the purpose of carrying out and to effect the object, design and purposes of said conspiracy, combination, confederation and agreement aforesaid, the hereinafter named defendants did at the times hereinafter set forth, commit the following overt acts

within the Southern Division of the Northern District of California, and within the jurisdiction of this Court:

1. On or about March 9, 1940, in the City of Watsonville, County of Santa Cruz, State of California, said defendants Tony Rodrigues and John A. Woodworth signed a lease for the premises known as the Hall Ranch, Route 1, Box 77A, Watsonville, California.

2. On or about April 2, 1940, in the City of Watsonville, County of Santa Cruz, California, said defendant Lester A. Woodworth signed an application for electric service for the premises known as the Hall Ranch, Route 1, Box 77A, Watsonville, California.

3. On or about June 15, 1940, said defendant Raymond Jehl bought ten 100-lb. sacks of sugar from the Independent Grocery Company, located at 169 Main Street in the City of Watsonville, County of Santa Cruz, California.

4. On or about August 28, 1940, said defendant Tony Rodrigues operated a still at a place known as the Hall Ranch, Route 1, Box 77A, Watsonville, California.

To the indictment in question the appealing defendant entered a plea of not guilty.

The defendant Rodrigues pleaded guilty. The defendant Woodworth pleaded not guilty and was convicted at the trial from which the appellant Jehl urges this appeal. Woodworth is not a party to this appeal.

The appellant was convicted by a verdict of a jury on June 27, 1941. The appellant was found guilty of all the nine counts contained in the indictment. (Tr. R. pp. 7, 8.)

The appellant was sentenced by the trial Court as follows:

Upon Count One of the Indictment for the period of Two (2) Years and to pay a fine to the United States in the sum of One Hundred and No/100 Dollars ($100.00) and to pay a penalty of Five Hundred and No/100 Dollars ($500.00);

Upon Count Two of the Indictment to pay a fine to the United States in the sum of One Hundred and No/100 Dollars ($100.00) and to pay a penalty of One Thousand and No/100 Dollars ($1000.00);

Upon Count Three of the Indictment for the period of Two (2) Years and pay a fine to the United States in the sum of Five Hundred and No/100 Dollars ($500.00);

Upon Count Four of the Indictment for the period of Two (2) Years and pay a fine to the United States in the sum of One Hundred and No/100 Dollars ($100.00);

Upon Count Five of the Indictment for the period of Two (2) Years and to pay a fine to the United States in the sum of Five Hundred and No/100 Dollars ($500.00);

Upon Count Six of the Indictment for the period of Two (2) Years and to pay a fine to the United

States in the sum of Five Hundred and No/100 Dollars ($500.00);

Upon Count Seven of the Indictment for the period of Three (3) Years;

Upon Count Eight of the Indictment to pay penalty to the United States in the sum of Five Hundred and No/100 Dollars ($500.00);

Upon Count Nine of the Indictment for the period of Two (2) Years;

It Is Further Ordered that the periods of imprisonment imposed on the defendant on Counts One, Three, Four, Five, Six, and Nine, run concurrently; that the period of imprisonment imposed on the defendant on the Seventh Count of the Indictment begin and run from and after the expiration or execution of the periods of imprisonment imposed on the defendant on Counts One, Three, Four, Five, and Six of the Indictment.

The appellant was thus sentenced to a full term of five years. (Tr. R. pp. 10, 11.)

Appellant moved the trial Court for a directed verdict of not guilty at the conclusion of the Government's case in chief, which motion was denied, to which denial an exception was taken. (Tr. R. p. 48.)

The appellant at the conclusion of defendant's case renewed his motion for a directed verdict, which motion was denied and an exception taken. (Tr. R. p. 90.)

Appellant moved the trial Court for a new trial on the ground that the evidence was insufficient as a

matter of law to sustain the verdict. This motion was denied, to which denial an exception was duly taken. (Tr. R. p. 105.)

The assignment of errors of appellant was filed within the time set by the trial Court. The Bill of Exceptions was settled and allowed by the trial Court within the time set by said Court. (Tr. R. pp. 108, 109.)

A SUMMARY OF THE EVIDENCE.

On August 28, 1940, certain agents of the Alcohol Tax Unit of the Bureau of Internal Revenue seized a still and the usual equipment used in its operation on a ranch known as the E. A. Hall Ranch, outside of Watsonville, Santa Cruz County, California. At the time of the seizure the officers arrested the defendant Tony Rodrigues in the still building. About midnight of the night of the seizure the defendant Woodworth drove up to the premises with his wife and step-daughter and was arrested. Rodrigues admitted his connection with the still. Woodworth denied being directly connected with the still. He told the officers he lived in a house next to the still and that he and Rodrigues leased the ranch to farm and raise hogs, but that they had leased the barn to an Italian whom he, Woodworth, could not describe.

The officers found 110 gallons of whiskey at the still. The still, according to the officers, was capable of producing 160 gallons of alcohol a day.

The still was illicit and the taxes required by the Internal Revenue laws were not paid.

The son of the owner of the ranch testified that his father rented the premises to Rodrigues and Woodworth for the purpose of raising hogs, corn and beans. He also said the house occupied by Woodworth was built by Rodrigues and Woodworth.

An official of a gas and electric company testified that electric service for the premises was in the name of Woodworth and that the readings showed the service to have started on April 2, 1940. The readings showed normal service for the first three months. During July and August the service was above normal.

Earl Goon, a Chinese grocer of Watsonville, California, testified that he knew the appellant, Raymond Jehl; that sometime in May or June, 1940, appellant Jehl came to his store with another man and asked if he could buy sugar in ten (10) sack lots. Goon agreed to this and a price was set. Goon said this price was a little higher than his usual price. About three weeks after the first visit to the grocery store, Goon said, appellant Jehl came to the store and placed an order for ten (10) sacks of sugar and told Goon someone would pick them up. A day or so later defendant Rodrigues picked the sugar up. About a week later appellant Jehl ordered sugar again and paid for it. Rodrigues picked this sugar up also. Goon testified that Jehl ordered sugar and paid for it about three times. Defendant Rodrigues paid for sugar three times but Jehl ordered it. On one occasion the sugar was ordered by telephone.

Goon testified that he read in the paper about the seizure of a still at the Hall ranch and that a few

days thereafter Jehl came to his store and told Goon not to worry. Goon told Jehl that Government agents had been to see him and Jehl said it was just a routine matter. Goon said on one occasion Woodworth picked up sugar that had been ordered by Jehl.

There was no conversation between Goon and Jehl or the man who was present on the first occasion to the effect that the sugar was to be used in an illicit still, or in connection with a distillery. Jehl did not ask Goon to tell the Government agents any particular story and did not tell him what to say to them. He at no time mentioned a still to Goon.

Joe Carrillo testified that during the year 1940 he worked on and off at the Colonial Inn, near San Jose, California, as a musician; that in the latter part of June or the first part of July the Colonial Inn was owned by appellant Jehl and Carillo then went to work for him. He said he had a conversation with Jehl sometime in the latter part of August or September. That there were present at this conversation the witness Carillo, his wife, appellant Jehl and a bartender and a few others. He said appellant was talking to Mrs. Carillo and said to her that he was in the "dumps". Appellant Jehl said, "I had to go to San Francisco and get some of my men out of jail. It made me feel bad; cost me some money." Appellant Jehl is alleged to have said he had to get some men out of jail for running a still and that it was his still. The witness admitted he had a dispute with appellant over wages and quit his employment. He admitted appellant never told him point blank that

he had a still but the witness gathered this from the conversation appellant had with the witness' wife. On no other occasion, directly or indirectly, did appellant indicate he was interested in a still. The bartender was a man named Tony Amizict.

Della Carrillo testified for the Government that during the year 1940 she was employed as a cook, waitress, dishwasher and hostess at the Colonial Inn for appellant Jehl. Sometime in September, 1940, she said she had a conversation with appellant at which were present besides herself and appellant, her husband and the bartender. Appellant at that time said he had been to San Francisco to see about bailing out a couple of his men. On another occasion, in the first part of August, appellant said to the witness, "It was awful to stand on a hill and watch thousands of dollars go to waste." The witness Della Carrillo testified that a few days before the first trial of this case, which trial resulted in a disagreement, appellant, with Woodworth and Rodrigues, came to the Colonial Inn. At that time the appellant asked her if anyone had been to see her about the case. She told him that agents had been to see her and had showed her some pictures which she identified. She said appellant told her, "Remember, you don't know anything." On another occasion in the latter part of August she said she heard appellant tell the bartender he had to go away for awhile because things were getting hot and he was going to Reno. On cross-examination, after being shown her testimony at the first trial, the witness admitted that at

the conversation concerning the bailing of men out, no mention was made of a still. She admitted that at the first trial nothing was ever said about a still and that she knew nothing about a still.

The Government rested its case.

The defendant Woodworth called as witnesses in his behalf Ferdinand Bock and Clyde H. Hines. These witnesses did not give any testimony affecting the appellant.

The defendant Woodworth testified as a witness in his own behalf but gave no testimony affecting appellant Jehl except he admitted he went to the grocery store of Mr. Goon and picked up four sacks of sugar for Mr. Rodrigues which he took to the Hall Ranch.

The appellant called Eugene E. Glorr, a physician and surgeon of Watsonville, California, who testified that appellant was a patient of his and that in the early part of 1940, he advised appellant to seek a warmer climate than Watsonville and to seek a change of activity. The doctor did not advise that appellant go into the night club business.

Angelo Gordon Amizict, called by appellant, testified he was the bartender at the Colonial Inn. This witness, when his attention was directed to the testimony of Mr. and Mrs. Carillo, denied that the conversations to which they testified ever took place in his presence. He also testified that when appellant was not at the Colonial Inn he, the witness, was in charge.

The appellant Jehl testified as a witness in his own behalf as follows:

That he was a married man and had one daughter. That he had lived in Watsonville for about thirty years continuously except when overseas during the last world war. That he was a licensed real estate broker and had been such since 1913 or 1914, and had his office in Watsonville with his brother. That during the period of January, 1940 to September, 1940, he and his brother were agents for a subdivision in Watsonville. That Dr. Glorr advised him to seek a change of climate and a different type of business. During June 1940 he went into possession of the Colonial Inn. He lived part of this time at the Colonial Inn and part of the time at his home in Watsonville. He employed Mr. and Mrs. Carrillo. Angelo Amizict was his manager at the Colonial Inn.

He had known Earl Goon for several years. In May of 1940 a Mr. Giorodini came to his place of business in Watsonville and presented a card from Louis Hirch, a jeweler, who had a store in San Jose and one in Salinas, California. Giorodini asked him if he knew the Independent Grocery and asked him to introduce Giorodini to the grocer. He took Giorodini to the grocery and introduced him to Mr. Goon. The men conversed about different things, sugar being one of them. Price and amounts of sugar were discussed. No order was placed at that time. Giorodini and appellant left the grocery. Appellant told Giorodini he was to take over the Colonial Inn. Giorodini came to the Colonial Inn later on several

occasions, sometimes alone and sometimes with others. On one of these occasions he asked appellant to take some money for him to Mr. Goon, when appellant went to Watsonville. He gave appellant $45 or $50 which he, appellant, gave to Mr. Goon the next day in Watsonville. He told Mr. Goon that Giorodini had sent the money and for Goon to set aside some sugar which Giorodini said he would have picked up.

Appellant took money to Mr. Goon on about three occasions but did not know what the sugar was to be used for. He learned for the first time that this sugar was used in connection with a still in September, 1940. At that time one of the men who used to come to the Colonial Inn, with Giorodini, came there and asked appellant if he knew Giorodini's still had been knocked over. Appellant replied he did not know Giorodini was in that kind of business. This man asked appellant if anyone had questioned him. This man then told him the money he took to Goon for the sugar was connected with the still and that the sugar was used in the still. He attempted to get in touch with Goon by phone but got Goon's brother and told him not to give Giorodini any more sugar. He later saw Mr. Goon who told him Government agents had been to see him. He did not ask Mr. Goon to withhold any information concerning appellant's activity in connection with the purchase of sugar.

Appellant denied the alleged conversation with Mr. and Mrs. Carrillo concerning bailing men out and concerning stills. He also denied the other conversations with Mrs. Carrillo. He admitted that prior to

his first trial he went to the Colonial Inn and saw Mrs. Carrillo. In this connection, he admitted he knew Rodrigues casually around Watsonville but met Woodworth for the first time in the office of Mr. Abrams, his attorney, after the indictment had been returned. Mr. Abrams had told him Mrs. Carrillo was to be a witness at the trial and wanted appellant to stop at the Colonial Inn on his way home from San Francisco, to find out if she was to be a witness. He stopped at the Colonial Inn and was told by Mrs. Carrillo that she had been interviewed but that she did not know anything. He last saw Giorodini in the middle of August. He did not know where he lived but had endeavored to find out.

The appellant rested his case and renewed his motion for a directed verdict and excepted to the denial of his motion.

In rebuttal the Government called David Levin, Charles J. Healey, Clay Gaines and John Becker. These witnesses gave no testimony concerning the appellant Jehl.

Louis Hirch was called in rebuttal as a witness against appellant. He testified that he was in the jewelry business in Salinas, California. He had known appellant Jehl for twelve to fifteen years. He did not know a man named Giorodini and did not give such a man one of his business cards to be delivered to appellant Jehl in Watsonville. A few days prior to this trial appellant Jehl came to Hirch's place of business and wanted him to remember the fact that such a card had been given. He told Jehl

he did not remember such a thing. Jehl wanted him to try and remember and to so testify. Hirch said he remembered no such thing and would not so testify. Jehl seemed to be sure Hirch had sent the man to him. Jehl did not ask Hirch to perjure himself. Jehl insisted to Hirch that Hirch had sent this man to him. Hirch said he could have sent the man to Jehl but did not remember anything like that coming up.

The appellant Jehl, called in his own behalf, admitted he went to see Louis Hirch before the trial and asked him about the man Hirch had sent to him. Hirch did not remember sending Giorodini to him but admitted he had sent other people to him. Jehl said he did not ask Hirch to testify falsely. Jehl said that he had talked to Alex Hirch on the phone but denied Alex Hirch asked Jehl to "lay off" his brother Louis.

Alex B. Hirch, called by the Government, testified he was a brother of Louis Hirch and had told appellant on the phone that Louis was not going to do what appellant wanted him to do. Jehl told the witness he did not want to discuss the matter on the phone. Jehl did not ask anyone to commit perjury. As far as the witness knew, appellant at no time asked his brother Louis to testify falsely.

The above summary of the evidence is somewhat lengthy, but the writer believes, because of the fact that the sole question on this appeal is the sufficiency of the evidence to sustain the verdict, it is necessary to set forth the evidence in detail.

SPECIFICATION OF ERRORS RELIED UPON.

THE COURT ERRED IN DENYING THE MOTION OF APPELLANT FOR A DIRECTED VERDICT OF NOT GUILTY. (Assignment of Errors I, II, III, Tr. R. p. 112.)

The assignments of errors contained in assignments I, II and III may be treated under one heading since they all relate to the sufficiency of the evidence to sustain the verdict and to the question whether as a matter of law the trial Court should have directed the jury to return a verdict of not guilty as to appellant on all nine counts contained in the indictment.

The first eight counts of the indictment charge substantive violations of the Internal Revenue laws with respect to the operation of an illicit still. The ninth count charges a conspiracy to violate the statutes covered by the first eight counts.

We believe that the entire evidence upon which the Government must rely to sustain the conviction of appellant may be summed up as follows:

A. The purchase of sugar by appellant on six occasions.

B. Alleged admissions made by appellant, wholly unconnected with the subject matter of the indictment.

In connection with the substantive offenses contained in the indictment, we point out that there is no evidence that appellant was even on the property where the still in question was found, that he knew a still was on such property, that he ever worked on or near said still or that he had any interest in the still that was the subject matter of the indictment. Without enumerating in detail the charges

contained in the first eight counts, we submit there is no evidence to show appellant did any of the things made criminal by the statutes involved in said first eight counts.

With respect to the substantive counts, we submit, the evidence is wholly insufficient to sustain appellant's conviction. In this connection we direct the Court's attention to the language of the Circuit Court of Appeals for the Third Circuit in *United States v. Sall,* 116 Fed. (2d) 745 at 747:

> "Although that offence may in fact have been committed in the course of the conspiracy, it is still necessary to prove that the defendant, even though he had joined the conspiracy, had also joined at least to the extent we have indicated in the concealment of alcohol which constitutes the substantive offence with which he is charged. It is the act of concealment with criminal intent and not the previous agreement, which is the gist of that offence. To hold otherwise would be to ignore the difference in character between the crime of conspiracy and substantive crimes which may result from it and to enable the government through the use of the conspiracy dragnet to convict a conspirator of every substantive offence committed by any other member of the group even though he had no part in it or even knowledge of it."

In the present case, assuming but not conceding, that the evidence sustains the conspiracy count against appellant, we contend it is wholly insufficient as to the substantive offences.

We believe our contention in this regard is supported by the opinion of the Circuit Court for the Seventh Circuit in the recent case of *United States v. Cusimono,* 123 Fed. (2d) 611.

With respect to the count charging the conspiracy, we respectfully submit there is not sufficient evidence in the record to support the conviction of appellant of the conspiracy charged.

It was the duty of the trial Court to direct a verdict of not guilty if the evidence was insufficient as a matter of law to support the conviction.

Tinsley v. U. S., 43 Fed. (2d) 890;
Cady v. U. S., 293 Fed. 829.

Assuming every fact testified to on behalf of the Government against appellant to be true, as we must on consideration of the failure of the trial Court to direct the verdict, we maintain there is a complete lack of evidence that appellant did any more than assist in the buying of sugar. There is no evidence that he knew of the existence of the still mentioned in the indictment.

Even if we assume that appellant purchased sugar to use in an illicit still, how is he connected with the still, the subject matter of the indictment?

All of the acts of appellant, in and of themselves, are innocent acts, and unless there is some evidence in the record to bring home to him knowledge of the still and conspiracy charged, he is entitled to a reversal of the conviction against him.

We do not intend to burden the Court with further citation of authority on the question of the duty of the trial Court to direct a verdict where the evidence is insufficient as a matter of law to sustain a conviction.

With respect to the alleged admissions offered against appellant, we contend they in nowise connect him with the particular offenses charged against him. The only evidence against appellant is the purchase by him of sugar and under the opinion of the Supreme Court in *United States v. Falcone,* 311 U. S. 205, 61 S. Ct. 204, we submit this is not sufficient to sustain his conviction.

CONCLUSION.

We respectfully submit:

I. The evidence is wholly insufficient to support appellant's conviction of the substantive offenses.

II. The evidence is insufficient to connect appellant with the conspiracy charge.

III. The conviction of appellant should be reversed as to all counts.

Dated, San Francisco,
February 4, 1942.

Respectfully submitted,
JAMES B. O'CONNOR,
Attorney for Appellant.